BANK UTAMA (M) BHD

v.

DATO' WONG YEON CHAI (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[SUIT NO: D5-22-467-1998]
28 AUGUST 2000

CIVIL PROCEDURE: *Service - Adjourned hearing date - Notice of motion to commit for contempt of court - Whether personal service of notice of adjourned hearing date on alleged contemnor necessary - Whether failure to effect personal service fatal to motion to commit*

CIVIL PROCEDURE: *Contempt of court - Notice of motion - Adjourned hearing date of motion to commit - Whether personal service of notice of adjourned hearing date on alleged contemnor necessary - Whether failure to effect personal service fatal to motion to commit*

This was the plaintiff's application to commit the defendant for contempt for disobeying a court order. At the hearing, counsel for the defendant raised the preliminary objection that the plaintiff had failed to notify the defendant (by personal service) of the adjourned hearing date of the notice of motion. It was contended that such a failure was fatal to the plaintiff's motion to commit.

Held:

[1] Where committal is sought, although the court has power to dispense with service of the notice of motion, personal service will generally be insisted upon. The need for service also applies to a notice of an adjourned hearing date. Hence, it was incumbent on the plaintiff to notify the defendant of the adjourned hearing date of the notice of motion by way of personal service.

[Preliminary objection upheld; notice of motion dismissed.]

Case(s) referred to:

Beeston Shipping Ltd v. Babanaft International Sa (The Eastern Venture) [1985] 1 All ER 923 ***(foll)***
Chiltern District Council v. Keane [1985] 2 All ER 118 ***(foll)***
Harmworth v. Harmworth [1987] 3 All ER 861 ***(dist)***
M v. P & Others (Contempt: Commital) Butler v. Butler [1992] 4 All ER 833 ***(dist)***
Nicholls v. Nicholls [1997] 2 All ER 97 ***(dist)***

Other source referred to:
Contempt, Arlidge, Eady & Smith, 2nd edn, p 742

For the plaintiff - Sri Dev Nair; M/s Anad & Noraini Advocates
For the defendant - Watson Peters; M/s Watson Peters & Mohd Faud Advocates

Reported by Gan Peng Chiang

JUDGMENT

Steve Shim J:

In this case, the plaintiff had applied by way of notice of motion to commit the defendant for contempt in disobeying the court order dated 2 July 1998. When this application came up for hearing on 2 February 2000, counsel for defendant raised a preliminary objection contending that the plaintiff had failed to serve and/or notify the defendant (alleged contemnor) personally of the date of the adjourned hearing of the said notice of motion and that such failure was fatal to the whole application. The plaintiff has of course disputed this proposition.

It has to be said at the outset that given the peculiar nature of the preliminary objection involving, as it does, an adjoured hearing of a notice of motion relating to committal proceedings, there are unfortunately no specific provisions under the Rules of the High Court 1980 which can be said to apply. In the circumstances, we must necessarily call in aid common law rules distilled from case jurisprudence.

Here, it is not disputed that the defendant was not present in court when the adjourned date of hearing of the notice of motion was given nor was he present on previous occasions when the said motion was called up for hearing, although his counsel was present on those occasions. The defendant has taken the position that the date of the adjourned hearing must be notified to the defendant by personal service. Counsel draws particular attention to the commentary in *Arlidge, Eady & Smith on Contempt* (2nd edn) on p. 742 which reads:-

> Where committal is sought, although the court has power to dispense with service of the notice of motion, personal service will generally be insisted upon unless there is clear evidence of evasion. It has even been held that the attendance of the alleged contemnor at the hearing does not per se waive the need for service. The need for service also applies to a notice of an adjourned hearing date.

Reference has also been made to the case of *Chiltern District Council v. Keane* [1985] 2 All ER 118 where the facts are these. Mr. Keane had some land, the permitted use of which was limited to agricultural use. Mr.

Keane however used the land for storage of vehicles and caravans. The Chiltern District Council obtained injunctive reliefs and undertakings from Mr. Keane following which the council used its statutory powers to clear the land enabling Mr. Keane to make a clean start. Nevertheless, Mr. Keane, despite the earlier undertakings, and injunction orders, brought back further vehicles for storage. Arising therefrom, an order was made by Goulding J. committing Mr. Keane to prison for two months for contempt of court. Mr. Keane appealed against that order. The appeal was in respect of procedural rules. One of the grounds of appeal was that the adjourned date of the hearing of the motion was not notified to him. Mr. Keane's counsel raised the point that where a hearing was adjourned to a date to be notified, the new date must be notified to the alleged contemnor by personal service. In dealing with this issue, Sir John Donaldson MR agreed with counsel and stated *inter alia*:-

> I think that is right, because the reasons for requiring personal service of the notice of motion in the first place apply equally to an adjourned hearing if it is not merely a continuation of the hearing...

My attention was further drawn to another case: *Beestin Shipping Ltd v. Babanaft International Sa (The Eastern Venture)* [1985] 1 All ER 923 which had dealt with the question of whether personal service on an alleged contemnor was required for an adjourned hearing even though the legal representative of the alleged contemnor was aware of the adjourned date. It was a case in respect of an order requiring a judgment debtor to attend for oral examination on his debts. On the date fixed for examination, the matter was adjourned to another date. The debtor was however not served with notificafion of the new date. The question which arose was whether the debtor's failure to attend on the adjourned date constituted contempt of court. There was no dispute that the alleged contemnor was represented bv experienced solicitors at all times who were well aware of the date of the adjourned hearing. Dunn, LJ, in considering this question was of the view that:-

> ... the judge fell into error in accepting that, because the original order with 7 April indorsed on it was served, that was good service for any subsequent hearing. In my view it was not. If the plaintiffs desired to enforce attendance at the subsequent hearing then they should have served the order which directed him to attend at the subsequent hearing.
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> ... there has been a suggestion, or more than a suggestion, by counsel for plaintiffs that, where the person sought to be committed is represented by solicitors and where, as here, the evidence is that the solicitors are perfectly well aware of the various orders that have been made, committal proceedings can be instituted without strict adherence to the rules. Nothing could be further

> from the truth: committal for contempt of court is an extreme remedy and, whatever the relationship between the solicitors may be and whatever knowledge in fact the person to be proceeded against for contempt of court has, none the less the committal proceeding will be bad unless the rules are strictly complied with. The reason for this of course is that commital proceedings are not like civil actions for breach of contract: they concern tne liberty of the subject.

In rebuttal, counsel for plaintiff contends that the cases cited above can be distinguished on their peculiar facts and therefore are not particularly relevant to the instant case. According to him, the English Court of Appeal had, in recent times, taken a wholly different perspective namely, that the court could, in the exercise of its discretion, waive any technical error in the notice of motion to commit or in the committal order itself if no prejudice was involved; citing in support the following cases: *Harmworth v. Harmworth* [1987] 3 All ER 861; *M v. P And Other (Contempt: Committal) Butler v. Butler* [1992] 4 All ER 833; *Nicholls v. Nicholls* [1997] 2 All ER 97.

In my view, these cases can be distinguished from the instant case. Therein, the procedural irregularity referred to an irregularity that was committed after the contemnor was heard and committed to prison and as there was no objection to the act of contempt itself, the Court of Appeal held that no substantial injustice was caused to the contemnor. In our case, the alleged contemnor (defendant) was not even properly summoned to court to answer the charges against him. As such, I do not think the cases cited are of much help to the plaintiff. In the circumstances, I am driven to the conclusion that the stand taken by the defendant has considerable merit. I accept the principles stated in *Chiltern District Council v. Keane* and *Beeston Shipping Ltd v. Babanaft International Sa (The Eastern Venture)* as parficularly relevant to the present case. In my view, given the factual circumstances of this case, it would be incumbent on the plaintiff to notify the defendant by way of personal service on him of the adjourned hearing of the notice of motion to commit for contempt. Committal is very serious matter and the courts must proceed very carefully before they make an order to commit a person to prison because quite obviously, the liberty of that person is at stake. In this case, the plaintiff's failure to notify the defendant by personal service is fatal to its application to commit. In the result, I have no difficulty in sustaining the preliminary objection raised by the defendant. On that basis, this application is therefore dismissed with costs.